PEOPLE REALTY SDN BHD

v.

RED ROCK CONSTRUCTION SDN BHD

COURT OF APPEAL, PUTRAJAYA
DENIS ONG JCA
HASHIM YUSOFF JCA
NIK HASHIM JCA
[CIVIL APPEAL NO: W-02-336-2004]
26 OCTOBER 2007

COMPANY LAW: *Winding up - Petition - Injunction to restrain further proceedings pending determination of cross-claim - Injunction application filed after filing and service of petition - Whether court precluded from granting injunction - Whether s. 221 Companies Act 1965 and r. 193 Companies (Winding-Up) Rules 1972 applicable*

The respondent filed a winding-up petition against the appellant after the appellant failed to comply with a statutory notice under s. 218 of the Companies Act 1965. The said notice was based on a judgment sum obtained by the respondent against the appellant which had been converted from an arbitration award pursuant to s. 27 of the Arbitration Act 1952. The appellant had also sought to set aside the arbitration award but that was dismissed on appeal to the Court of Appeal. Also, both the High Court and Court of Appeal dismissed the appellant's application for a stay of execution proceedings on the said judgment pending the hearing and disposal of the appeal against the same. After service of the said notice but before the filing of the petition, the appellant filed a cross-claim against the respondent. The appellant then filed a notice of motion (after the filing and service of the winding-up petition) for an injunction to restrain the respondent from taking any further proceedings upon the petition pending hearing of its cross-claim against the respondent. The High Court dismissed the motion. Hence, the appellant's appeal.

Held (dismissing the appeal)
Per Nik Hashim JCA (now FCJ) delivering the judgment of the court:

(1) The respondent's winding-up petition was grounded on a valid judgment the execution of which had not been stayed. In fact, the High Court and the Court of Appeal had dismissed the

appellant's application for a stay of execution of the judgment before the appellant filed its cross-claim. Hence, the respondent should not be prevented from pursuing its right to have the appellant wound up for its inability to pay its debt. Only on the hearing of the petition the court would be able to consider the cross-claim and determine whether it should exercise its discretion to order winding-up. In the event the appellant was wound up, the cross-claim could still proceed by the liquidator on behalf of the appellant under s. 236(2) of the Act. Thus, to consider the cross-claim which was a separate issue altogether before the hearing of the petition was premature and therefore should not be considered at that stage. (para 10)

(2) The power of the court to dismiss or stay the petition is to be exercised only 'on the hearing of the petition' and not earlier. (para 11)

(3) The cross-claim at this stage of the proceedings remained illusory and uncertain since it still had to go through the process of litigation before becoming a judgment. Even if there was a cross-claim, the petition should not be struck out in *limine* and should be heard on its merit. (para 12)

(4) The appellant's contention that the High Court had powers under s. 221 of the Act, r. 193 of the Companies (Winding-Up) Rules 1972 ('Rules') and under its inherent jurisdiction had no merit. Section 221 of the Act clearly provides for powers of court 'on hearing a winding-up petition' and not before the hearing of the petition whereas r. 193 of the Rules provides for enlargement or abridgement of time which clearly was not relevant to the issue before the court. The request for invocation of inherent powers of the court was misplaced. Rule 24 of the Rules clearly governed the case and prescribed a requirement that the petition must be advertised upon filing. By its terms, the requirement was mandatory and the court could not disregard the provision and act outside it. (para 13)

(5) Once a winding-up petition is filed the court is precluded from granting an injunction against advertisement or gazette of the petition. Therefore, the appellant was not entitled to the injunctive relief prayed for as the appellant's cross-claim for damages were purely monetary in nature. There was nothing

to be preserved by the grant of the injunction and there was no evidence of any irreparable harm. The learned judge was right in dismissing the motion with costs. (paras 14)

Bahasa Malaysia *Translation Of Headnotes*

Responden telah memfail petisyen penggulungan terhadap perayu selepas perayu gagal mematuhi notis statutori di bawah s. 218 Akta Syarikat 1965. Notis tersebut adalah berdasarkan kepada satu penghakiman yang diperolehi responden terhadap perayu yang ditukar dari award timbangtara di bawah s. 27 Akta Timbangtara 1952. Perayu juga memohon mengenepikan award timbangtara, namun atas rayuan permohonannya itu ditolak oleh Mahkamah Rayuan. Selain itu, kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan menolak permohonan perayu untuk penggantungan prosiding penghakiman tersebut sementara menunggu pelupusan rayuan terhadapnya. Selepas penyerahan notis tersebut tetapi sebelum pemfailan petisyen, perayu telah memfail tuntutan balas terhadap responden. Perayu kemudian memfail notis usul (selepas pemfailan dan penyerahan petisyen penggulungan) untuk suatu injunksi bagi menghalang responden dari meneruskan dengan apa-apa prosiding terhadap petisyen sementara menunggu pendengaran tuntutan balasnya terhadap responden. Mahkamah Tinggi menolak usul dan perayu merayu.

Diputuskan (menolak rayuan)
Oleh Nik Hashim HMR (kini HMP) menyampaikan penghakiman mahkamah:

(1) Petisyen penggulungan responden didasarkan kepada satu penghakiman yang sah di mana pelaksanaannya tidak pernah digantung. Malah, Mahkamah Tinggi dan Mahkamah Rayuan telah menolak permohonan perayu untuk penggantungan pelaksanaan penghakiman sebelum perayu memfailkan tuntutan balasnya. Oleh itu, responden tidak harus dihalang dari menuntut haknya untuk menggulung perayu atas kegagalan perayu membayar hutangnya. Hanyalah pada pendengaran petisyen mahkamah boleh mempertimbang tuntutan balas dan menentukan sama ada ia harus melaksanakan budibicaranya untuk memerintahkan penggulungan. Sekiranya perayu digulungkan, tuntutan balas masih boleh diteruskan oleh penyelesai bagi pihak perayu di bawah s. 263(2) Akta. Oleh itu, untuk mempertimbang tuntutan balas yang merupakan

A suatu isu yang berasingan sebelum pendengaran petisyen adalah pramasa. Ia tidak harus dipertimbang di peringkat itu.

(2) Kuasa mahkamah untuk menolak atau menggantung petisyen hendaklah dilaksanakan hanya 'ketika mendengar petisyen' dan
B tidak lebih awal dari itu.

(3) Tuntutan balas di peringkat prosiding ini adalah ilusori dan tidak pasti oleh kerana ia masih perlu melalui proses litigasi sebelum menjadi satu penghakiman. Jikapun tuntutan balas
C wujud, petisyen tidak harus dibatalkan *in limine* dan harus didengar di atas meritnya.

(4) Hujah perayu bahawa Mahkamah Tinggi mempunyai kuasa di bawah s. 221 Akta, k. 193 Kaedah-kaedah (Penggulungan) Syarikat 1972 ('Kaedah') dan di bawah bidangkuasa
D semulajadinya adalah tidak bermerit. Seksyen 221 Akta memperuntukan dengan jelas kuasa-kuasa mahkamah 'apabila mendengar suatu petisyen penggulungan' dan bukannya sebelum mendengar petisyen, sementara k. 193 Kaedah membuat peruntukan tentang perlanjutan atau pemendekan
E masa yang jelas tidak relevan kepada isu di hadapan mahkamah. Permohonan untuk pemakaian kuasa-kuasa semulajadi mahkamah juga adalah tersasul. Kaedah 24 Kaedah jelas merangkumi kes dan menetapkan syarat bagi pengiklanan petisyen sewaktu ianya difailkan. Berdasarkan terma-termanya,
F syarat tersebut adalah mandatori dan mahkamah tidak boleh memandang sepi kepadanya dan bertindak di luar batasannya.

(5) Sebaik sahaja petisyen penggulungan difailkan mahkamah dilarang dari memberikan injunksi terhadap pengiklanan ataupun
G penggazetan petisyen. Oleh itu, perayu tidak berhak kepada relif injunktif yang dipohon disebabkan tuntuan balas perayu untuk gantirugi bersifat kewangan semata-mata. Tiada apa pun yang perlu dilindungi melalui pemberian injunksi dan begitu juga tiada keterangan mengenai kerugian yang tak boleh dipulihkan.
H Yang arif hakim betul dalam menolak usul dengan kos.

Case(s) referred to:

Azman & Tay Associates Sdn Bhd v. Sentul Raya Sdn Bhd [2002] 4 CLJ 391 HC ***(refd)***

Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd [1988] 2
I *CLJ 424; [1988] 1 CLJ (Rep) 5 SC* ***(refd)***

Crocuses & Daffodils (M) Sdn Bhd v. Development & Commercial Bank Bhd [1997] 3 CLJ 485 CA ***(refd)***

In re Bayoil SA [1999] 1 WLR 147 ***(dist)***

Malayan Plant (Pte) Ltd v. Moscow Narodny Bank Ltd [1980] 2 MLJ 53 ***(refd)***
Morgan Guaranty Trust Co New York v. Lian Seng Properties Sdn Bhd [1991] 1 CLJ 260; [1991] 1 CLJ (Rep) 317 SC ***(refd)***
RHB Bank Bhd v. Pembinaan MCP Sdn Bhd [2003] 5 CLJ 335 HC ***(refd)***

Legislation referred to:
Arbitration Act 1952, ss. 24, 27
Companies Act 1965, ss. 218, 221, 236(2)
Companies (Winding-Up) Rules 1972, r. 193
Courts of Judicature Act 1964, s. 42

For the appellant - A Kanesalingam (K Shanmuga with him); M/s Kanesalingam & Co
For the respondent - SJ Ooi; M/s Wong-Chooi & Mohd Nor

[Appeal from High Court, Kuala Lumpur; Companies Winding-up No: D3-28-1000-2003]

Reported by Usha Thiagarajah

JUDGMENT

Nik Hashim JCA:

[1] This judgment is delivered pursuant to s. 42 of the Courts of Judicature Act 1964 (Act 91) as Denis Ong Jiew Fook, JCA, who presided at the hearing of the appeal, has since retired.

[2] The undisputed facts are that the petition for winding-up was presented against the appellant after the service of a statutory notice under s. 218 of the Companies Act 1965 (the Act) on the appellant requiring payment of RM1,117,179.68 based on a judgment obtained by the respondent dated 11 June 2003 which had been converted from an arbitral award pursuant to s. 27 of the Arbitration Act 1950.

[3] The appellant had, after service of the statutory notice but before the filing of the petition, filed a cross-claim against the respondent in High Court Pulau Pinang Civil Suit No. 22-597-2003 (MT4) for RM2,107,171.67 special damages and general damages.

[4] An application to set aside that arbitral award for misconduct under s. 24 of the Arbitration Act 1950 was then the subject of civil appeal P-02-905-2002 in the Court of Appeal. On 22 June 2004 the Court of Appeal dismissed the appeal.

[5] Both the High Court and the Court of Appeal had before the filing of the cross-claim dismissed the appellant's applications for a stay of execution proceedings on the judgment pending the hearing and disposal of the appeal against the judgment.

[6] The appellant's cross-claim against the respondent in the High Court Pulau Pinang has not been disposed of.

[7] On 27 December 2003 the appellant filed the notice of motion (encl. 6) ie, after the winding-up petition was filed and served on the appellant on 8 December 2003. The motion prayed for an order that the respondent be restrained by injunction from taking any further proceeding upon the petition by advertising the same and that the petition be removed from the file of proceedings.

[8] On 24 March 2004 the learned judge of the High Court Kuala Lumpur dismissed the motion with costs on the following grounds:

(1) Permohonan responden (appellant) adalah suatu penyalahgunaan proses undang-undang kerana responden (appellant) tidak boleh menghalang pempetisyen dari mengiklankan dan mewartakan petisyen penggulungan yang difailkan.

Ini adalah kerana di bawah kaedah 24 Kaedah-Kaedah Penggulungan Syarikat 1972, sesuatu petisyen penggulungan itu mesti diiklankan dan diwartakan. Ini adalah suatu peruntukan mandatory.

(2) Selain dari itu, permohonan responden (appellant) untuk menangguhkan perlaksanaan penghakiman yang diperoleh oleh pempetisyen (respondent) terhadap responden (appellant) juga telah ditolak oleh Mahkamah Rayuan pada 19-8-2003.

Ini menunjukkan Mahkamah Rayuan berpendapat tiada sebarang keadaan khas yang wujud untuk menjadi alasan kenapa penghakiman tersebut tidak boleh dikuatkuasakan.

(3) Petisyen penggulungan ini adalah berdasarkan satu penghakiman Mahkamah yang sempurna dan boleh dikuatkuasakan.

(4) Walaupun responden (appellant) dikatakan mempunyai satu tuntutan balas terhadap pempetisyen (respondent) yang mana dinafikan oleh pempetisyen (respondent) ianya masih boleh diteruskan walaupun syarikat responden (appellant) digulungkan. Ini adalah kerana tuntutan balas tersebut adalah tersendiri dan berasingan daripada tindakan ini.

(5) Notis di bawah seksyen 218 Akta Syarikat 1965 telah diserahkan kepada responden (appellant) di alamat berdaftarnya pada 15-9-2003 dan alamat perniagaannya pada 23-9-2003.

Walaubagaimanapun responden (appellant) tidak berbuat apa-apa sehinggalah petisyen penggulungan difailkan pada 4-11-2003 dan tarikh perdengaran petisyen ini telah ditetapkan pada 11-2-2004.

(6) Tiada keadaan khas yang ditunjukkan oleh responden (appellant) bagi membenarkan permohonan responden (appellant) ini.

[9] Before us, learned counsel for the appellant contended that:

(a) the respondent had no standing to file the winding up petition against the appellant because the appellant has a valid cross claim which exceeds the amount in the judgment obtained by the respondent and in support he cited two cases:

(i) *Malayan Plant (Pte) Ltd v. Moscow Narodny Bank Ltd* [1980] 2 MLJ 53 where Lord Edmund – Davies in delivering the judgment of the Judicial Committee of the Privy Council said at p 55 para A-B:

> There is no distinction in principle between a cross-claim of substance (such as in the Wools case) and a serious dispute regarding the indebtedness imputed against a company, which has long been held to constitute a proper ground upon which to reject a winding-up petition.

(ii) *In re Bayoil S.A* [1999] 1 WLR 147 where the English Court of Appeal held that where a winding-up petition was based on an undisputed debt but the company had a genuine and serious cross-claim, which it had been unable to litigate, exceeding the amount of the petitioner's debt the court would, in the absence of special circumstances, exercise its discretion by dismissing or

staying the petition; and that, accordingly, in the circumstances, the judge should have either dismissed or stayed the petition.

And

(b) the High Court has powers under section 221 of the Act, rule 193 of the Companies (Winding-Up) Rules 1972 (the Rules) and under its inherent jurisdiction to restrain the advertisement of the petition and to make consequential orders.

[10] With respect, we do not agree. The respondent's winding-up petition was grounded on a valid judgment the execution of which had not been stayed. In fact both the High Court and the Court of Appeal had before the filing of the cross claim dismissed the appellant's application for a stay of execution of the judgment. Hence the respondent should not be prevented from pursuing its right to have the appellant wound up for its inability to pay its debt. Only on the hearing of the petition the court would be able to consider the cross claim and determine whether it should exercise its discretion to order winding-up or not to order it. In the event the appellant is ordered to be wound up the cross claim can still be proceeded by the liquidator on behalf of the appellant under s. 236(2) of the Act (*Crocuses & Daffodils (M) Sdn Bhd v. Development & Commercial Bank Ltd* [1997] 3 CLJ 485 CA at p 491). Thus, to consider the cross claim, which is a separate issue altogether, before the hearing of the petition is premature and therefore, it should not be considered at that stage. (See *Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd* [1988] 2 CLJ 424; [1988] 1 CLJ (Rep) 5 SC).

[11] The test in *re Bayoil, supra,* regarding cross-claim is not applicable in the present case, *re Bayoil* was decided upon consideration of a foreign statute. The case, like *Malayan Plant, supra,* also fortifies the view that the power of the court to dismiss or stay the petition is to be exercised only 'on the hearing of the petition' and not earlier. Therefore, the need to show special circumstances why the appellant should be wound up before the cross-claim is determined does not arise.

[12] We agree with the respondent that the cross-claim at this stage of the proceedings remains illusory and uncertain since it had still to go through the process of litigation before it could eventually graduate into a judgment. (See *RHB Bank Bhd v.*

Pembinaan MCP Sdn Bhd [2003] 5 CLJ 335). Even if there exists the cross claim, the petition should not be struck out in limine and should be heard on its merit (*Morgan Guaranty Trust Co. New York v. Lian Seng Properties Sdn Bhd* [1991] 1 CLJ 260; [1991] 1 CLJ (Rep) 317 SC).

[13] With regard to the appellant's contention that the High Court has powers under s. 221 of the Act, r. 193 of the Rules and under its inherent jurisdiction to restrain the advertisement of the petition, we hold that the contention has no merit. Section 221 clearly provides for powers of court 'on hearing a winding-up petition' and not before the hearing of the petition and whereas r. 193 provides for enlargement or abridgment of time which clearly has no relevance to the issue before us. The request for invocation of inherent powers of the court is misplaced. Rule 24 of the Rules clearly governs this case and prescribes a requirement of advertisement of petition upon it being filed. By its terms, the requirement is mandatory; and surely the court cannot disregard the provision and act outside it.

[14] In our judgment, once a winding-up petition is filed, the court is precluded from granting an injunction against advertisement or gazettal of the petition. In this regard, we agree with Vincent Ng J (later JCA) in *Azman & Tay Associates Sdn Bhd v. Sentul Raya Sdn Bhd* [2002] 4 CLJ 391 at p 396 where he said:

> I would hold that the court is not empowered to make any order to restrain or injunct the petitioners from carrying out their statutory obligation to comply with r. 24.

Therefore, the appellant is not entitled to the injunctive relief prayed for as the appellant's cross-claim for damages was purely monetary in nature; there was nothing to be preserved by the grant of the injunction and indeed, there is no evidence of any irreparable harm. Thus, the learned judge was right in dismissing the motion with costs.

[15] Accordingly, we dismiss the appeal with costs and order that the deposit be paid to the respondent to account of its taxed costs.

[16] My learned brother Hashim Yusoff, FCJ has seen this judgment in draft and has expressed his agreement with it.